

Exhibit 1

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

In re:

LEHMAN BROTHERS HOLDINGS INC.,

Debtor.

**Chapter 11 Case
No. 08-13555 (SCC)**

(Jointly Administered)

**ORDER GRANTING MOTION PURSUANT TO THE AMENDED SPV ADR ORDER
AND SECTION 105(a) OF THE BANKRUPTCY CODE TO (I) ENFORCE
SETTLEMENT AND RELEASE AGREEMENT AND (II) GRANT
ATTORNEYS' AND MEDIATOR'S FEES AND COSTS**

Upon the motion, dated January 30, 2017 [ECF No. 54675] (the "Motion"),¹ of Lehman Brothers Holdings Inc. ("LBHI" or the "Plan Administrator"), as Plan Administrator under the *Modified Third Amended Joint Chapter 11 Plan of Lehman Brothers Holdings Inc. and its Affiliated Debtors* for certain entities in the above-referenced chapter 11 cases, on behalf of Lehman Brothers Special Financing Inc. ("LBSF"), (i) to enforce the Settlement and the Release Agreement among LBSF and Shinhan Bank ("Shinhan"), as more fully described in the Motion; and (ii) grant the Plan Administrator attorneys' and mediator's fees and costs; and the Court having jurisdiction to consider the Motion and the relief requested therein in accordance with 28 U.S.C. §§ 157 and 1334 and the Amended Standing Order of Reference M-431, dated January 31, 2012 (Preska, C.J.); and consideration of the Motion and the relief requested therein being a core proceeding pursuant to 28 U.S.C. § 157(b); and venue being proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409; and due and proper notice of the Motion having been provided in accordance with the procedures set forth in the amended order entered June 17,

¹ Capitalized terms used but not defined herein shall have the meaning set forth in the Motion.

2010 governing case management and administrative procedures [ECF No. 9635] to (i) K&L Gates LLP, 599 Lexington Ave., New York, New York 10022, Attn: John A. Bicks, Esq., attorneys for Shinhan Bank, (ii) the U.S. Trustee, (iii) the Securities and Exchange Commission, (iv) the Internal Revenue Service, (v) the United States Attorney for the Southern District of New York, and (vi) all parties who have requested notice in the chapter 11 cases; and Shinhan having filed a memorandum of law in opposition to the Motion [ECF No. 54817]; and the Plan Administrator having filed a reply memorandum of law in support of the Motion [ECF No. 55011]; and a hearing having been held on March 21, 2017 (the “Hearing”) to consider the relief requested in the Motion; and upon the record of the Hearing; and after due deliberation, for the reasons set forth in the decision of the Court read into the record at the Hearing (the “Bench Decision”), it is

ORDERED that the Motion is granted to the extent set forth in the Bench Decision, which is incorporated herein by reference, and a transcript of which is annexed as Exhibit A hereto; and it is further

ORDERED that the Court finds that the Settlement, and the Release Agreement attached as Exhibit D to the Stipulation, are enforceable; and it is further

ORDERED that Shinhan shall perform the terms and conditions of such Release Agreement; and it is further

ORDERED that Shinhan shall pay LBSF the agreed-upon Settlement Amount within ten (10) days after this Order becomes final and non-appealable, and LBSF shall file a notice of dismissal of the claims asserted against Shinhan in *LBSF v. Bank of America Nat. Association et al.*, Adv. No. 10-03547, filed in this Court, with prejudice within seven (7) business days after such payment; and it is further

ORDERED that this Order is binding and effective on the Plan Administrator, LBHI, LBSF, Shinhan, and any successors thereto; and it is further

ORDERED that the enforcement of this Order shall be stayed for fourteen (14) days after its entry, provided that such stay shall not extend the 14-day appeal period set forth in Bankruptcy Rule 8002; and it is further

ORDERED that Shinhan may obtain a further stay pending appeal by posting a supersedeas bond, subject to this Court's approval, pursuant to Local Bankruptcy Rule 8007-1(a) in the amount of the Settlement Amount plus 11% plus \$250, provided that any such bond may be submitted by a motion or agreed order filed with the Court that redacts the Settlement Amount pursuant to Paragraph 13 of the Amended SPV ADR Order, with no further requirement to submit such motion or agreed order under seal, and such stay shall take effect when the Court enters its order approving such bond; and it is further

ORDERED that notice of the Motion as provided therein shall be deemed good and sufficient notice of such Motion; and it is further

ORDERED that this Court retains jurisdiction with respect to all matters arising from or related to the implementation of this Order.

Dated: March 29, 2017
New York, New York

/S/ Shelley C. Chapman
UNITED STATES BANKRUPTCY JUDGE

Exhibit A

1 UNITED STATES BANKRUPTCY COURT
2 SOUTHERN DISTRICT OF NEW YORK

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5 In the Matter of:

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7 LEHMAN BROTHERS HOLDINGS INC., Case No. 08-13555 (SCC)

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9 Debtor.

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11 - - - - - x

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13 U.S. Bankruptcy Court
14 One Bowling Green
15 New York, New York

16
17 March 21, 2017
18 10:04 AM

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21 B E F O R E :
22 HON SHELLEY C. CHAPMAN
23 U.S. BANKRUPTCY JUDGE
24
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1 Hearing re: Doc #54675 Motion pursuant to the Amended SPV ADR
2 Order and Section 105(a) of the Bankruptcy Code to (I) Enforce
3 settlement and release agreement and (II) Grant attorneys and
4 mediators fees and costs

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25 Transcribed by: Jamie Gallagher

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1 P R O C E E D I N G S

2 THE COURT: Please have a seat. How's everyone
3 today? So I take it you haven't settled, no?

4 (Chorus of no)

5 MS. MARCUS: Good morning, Your Honor. Jacqueline
6 Marcus, Weil, Gotshal & Manges on behalf of Lehman Brothers
7 Holdings Inc. and its affiliated debtors.

8 This is -- we're here this morning for the 106th
9 omnibus hearing and most of the matters are not going forward
10 today. Four of them have been adjourned, two have been
11 withdrawn. And what we're going forward with is the motion
12 pursuant to the amended SPV ADR order in Section 105(a) of the
13 Bankruptcy Court to enforce the settlement agreement with
14 Shinhan Bank. Your Honor, that will be handled by my partner,
15 Chris Cox.

16 I just wanted to mention that there is one
17 housekeeping matter --

18 THE COURT: Okay.

19 MS. MARCUS: -- that I'd like to address when we're
20 done.

21 THE COURT: Okay, certainly.

22 MS. MARCUS: Thank you.

23 THE COURT: All right, so I'm well familiar with this
24 dispute and I've read the papers a number of times. So I'm
25 happy to hear you if there's anything you'd like to add, but

1 certainly you don't have to review what's in the papers. So
2 I'll leave it to you.

3 MR. COX: Your Honor, if I could just briefly --

4 THE COURT: Sure.

5 MR. COX: -- address it. And you have 60 pages of
6 briefing, so I have no intention of going through all of the
7 briefs again. And I just wanted to highlight just a couple of
8 points I think are there because what we really have here is
9 two ships passing in the night, right? So --

10 THE COURT: Right.

11 MR. COX: I just wanted to reinforce a few things,
12 right? Which is one which came out of our last meeting, right,
13 which is this release agreement doesn't say it's a settlement
14 and release. It says it's a release. And nowhere was there a
15 negotiation that we were going to put the word settlement in
16 there. And that's key when you look at Shinhan's cases because
17 all the cases they cite were for settlement agreements and
18 settlement release agreements. And I think that's just a very
19 important point here because as you could tell from our
20 briefing, we look at the settlement and the releases separate.
21 And the release is just a functional thing about the timing and
22 of the dismissals and releases. And what we had here was a
23 release where there was never a negotiation that it was also
24 going to be reducing the settlement to writing.

25 And I think if you look at that, it's really

1 dispositive of the issue because the settlement that was
2 reached on April 20th was very simple. It just said Shinhan
3 pays X --

4 THE COURT: Pay money, get released.

5 MR. COX: And you both provide general releases, you
6 know, so we're done. And I don't think we really need to kind
7 of get into that much more, but importantly, I wanted to
8 address this moral hazard issue. Without getting into the
9 release agreement and the language, because we've briefed on
10 that, I'm happy to discuss anything you want to discuss. But
11 here what we have is a situation where there was full briefing
12 on the B of A motion.

13 THE COURT: I never thought I knew that.

14 MR. COX: And everybody knew it. The briefing had
15 been submitted. The matter had been submitted. And both
16 parties reached a compromise based on the risk of what Your
17 Honor was going to do at that moment.

18 THE COURT: At any minute, right.

19 MR. COX: And what we had was a situation where
20 Shinhan is basically arguing -- they gave themselves a
21 unilateral option, right? Which is you get all of these papers
22 together for us, Lehman. You sign two agreements that you're
23 bound by your compromised settlement. And we're going to give
24 ourselves a unilateral option and we're going to sit on it.
25 And if the order is in favor of us, we're going to rip it up.

1 If it's not in favor of us, we get a settlement on very good
2 terms. And whether that was intentional or not and I'm not
3 accusing them of doing anything. We haven't done any
4 discovery. But whether it was intentional or not, it still
5 places Lehman in a position where they can't win, right? And
6 that can't be what the party's bargain was. It had to be
7 something else.

8 And what the bargain was was we reached a compromise
9 settlement based on all of the factors at the time. It
10 stipulated -- everything was agreed to, right? So whether
11 you're looking at the first Winston factor where there was no
12 reservation of rights to -- that things need to be reduced in
13 writing, or the third Winston factor where everything was in
14 place, I think under any term we have a binding settlement
15 here. And with regard to the 2104 motion -- well, the argument
16 that you don't have a signed writing without a signature from
17 the lawyers, I think we addressed that fairly well that we have
18 these signed e-mail exchanges where they had the authority to
19 bind the companies. And so I think we meet that, whether or
20 not it applies in Federal Court.

21 And the last point I'd make, Your Honor, is that you
22 do have equitable power to order any attorney's fees and
23 sanctions. And we did not get greedy in asking for sanctions.
24 All we ask for were the additional attorney's fees and mediator
25 fees from the time we reached the settlement and they said that

1 they're not going to sign it. So I'm happy to answer any
2 questions Your Honor might have, but otherwise I'll submit.

3 THE COURT: Okay. Well, if it doesn't end after
4 today or at some point, there could be additional fees that are
5 incurred if there's going to be an appeal. The Bank of America
6 action is now up on appeal itself, which is neither here nor
7 there, but --

8 MR. COX: But yes, I think, unless the parties
9 settle, there's going to be more fees and costs going forward
10 with an appeal on. So we think that it's only fair to put us
11 in a position where we're back on equal footing when we were
12 when we thought we were getting paid our settlement.

13 THE COURT: Okay, thank you.

14 MR. COX: All right. Thank you, Your Honor.

15 MR. BICKS: Good morning, Your Honor.

16 THE COURT: Good morning.

17 MR. BICKS: I'll do my very best to be brief. I'm
18 pretty sure --

19 THE COURT: Okay.

20 MR. BICKS: -- I will not be as brief as Chris. I do
21 have a couple of --

22 THE COURT: But I did read everything.

23 MR. BICKS: I appreciate that.

24 THE COURT: Many times.

25 MR. BICKS: I believe it, absolutely, Your Honor.

1 THE COURT: Okay.

2 MR. BICKS: So Chris has said an interesting thing,
3 he said the release agreement is a separate thing. I'm not
4 really sure what that means, but I guess the way I see it, and
5 if you look at the proposed order that Lehman has handed you,
6 they're asking you to do two things. They're asking you to
7 enforce what they're calling a settlement that they say
8 occurred on April 20th. And separately, they're asking you to
9 enforce a release agreement that never got signed about a month
10 later.

11 The problem is here, there really isn't a path down
12 the middle here. In order for you, respectfully, to rule in
13 Lehman's favor on this matter, I think you have to do one of
14 two things, but not both of two things. You either have to
15 decide that there was enough that had been agreed to on April
16 20th --

17 THE COURT: Yeah, there was an agreement. There was
18 a settlement. There's going to be a payment of money. And
19 there's going to be a release.

20 MR. BICKS: See, the problem --

21 THE COURT: Period.

22 MR. BICKS: The problem with that, Your Honor, is it
23 is absolutely clear that there were a lot of essential terms
24 that forget about not having been agreed to --

25 THE COURT: No, there weren't. There were -- it is

1 the simplest settlement that there could possibly be. Pay
2 money. Get released.

3 MR. BICKS: So, so --

4 THE COURT: There's not a lot of moving parts here.

5 MR. BICKS: But let me ask you about one. Pay money.
6 When? Five years from now? Two days from now? Ten years from
7 now? The parties had absolutely no agreement because we had
8 never even talked about when money would be paid. And I won't
9 regale you with them.

10 THE COURT: Could we just be forthcoming here?

11 MR. BICKS: Please.

12 THE COURT: Okay. There was a settlement. And then,
13 incredibly, against all odds, the B of A ruling was issued
14 right at the moment of truth. That's what happened. It's not
15 about anything else but that. So I appreciate that many
16 arguments have been constructed to get around that unfortunate
17 fact, but it's a fact.

18 MR. BICKS: Your Honor --

19 THE COURT: Okay, so --

20 MR. BICKS: Obviously, we respectfully disagree that
21 there was a settlement because, in fact, a lot of terms were
22 missing. But if you've concluded that there was, let me ask
23 you this question, please.

24 THE COURT: You don't get to ask me questions, okay?

25 MR. BICKS: You're right, I don't. But I would ask

1 this question to Lehman. If you believe that there was a
2 settlement, why did you then draft a settlement agreement, send
3 it to us, which contained a merger clause? Why would you do
4 that? Why would they do that? The reason they did that is
5 simple, because their understanding was precisely the same as
6 ours. That we had agreed to one thing and one thing only on
7 April 20th. And that was in the context of an overall
8 settlement, how much our client would pay to Lehman to be done
9 with this. They understood, just as we did, that this would
10 ultimately be wrapped up in a proper settlement agreement. How
11 does Lehman know this? Because they've settled about 200 of
12 these cases. How do we know this? Because we have settled
13 cases, these same cases with them. So we knew, just as they
14 knew, that this would all be subject to a proper settlement
15 agreement. And the fact that the agreement that they sent us,
16 we didn't write it. They sent us the draft. The fact that the
17 draft they sent us contains a merger clause, contains
18 provisions that says it's not effective until it's signed,
19 those completely fly in the face on this argument that they're
20 trying to make now that what you ought to do is take a little
21 from this one and a little from that one. You know, that's --

22 THE COURT: A little from what one? A little from
23 what one?

24 MR. BICKS: A little from this supposed settlement on
25 April 20th --

1 THE COURT: There were -- there was money to be paid
2 and there was a release. And Judge Mabey said there's a
3 settlement and everybody agreed.

4 MR. BICKS: And --

5 THE COURT: Super simple.

6 MR. BICKS: Super simple if you're willing to
7 disregard the fact that material pieces of that settlement were
8 gone. And if you are willing to disregard the fact that what
9 Winston said over 30 years ago, which is as good law as it is
10 -- then as it is now. Winston says you look at the intent of
11 the parties to decide when they intend to be bound. What did
12 these parties put in the draft agreement that was prepared by
13 Lehman, negotiated through a couple of rounds? What did these
14 parties put in the agreement was real simple. They put in the
15 agreement that we intended to be bound when everyone signed.

16 And I want to talk just a little bit about this whole
17 -- you know, this moral hazard concept. I mean, in a way I'm
18 flattered. Are they saying that we knew more than they did?

19 THE COURT: No, they're simply saying that as the
20 delay occurred, which according to the uncontested record
21 that's before me, I'm not deciding any disputed facts, the
22 delay was solely on Shinhan part for what appeared to be
23 internal administrative reasons, giving Shinhan every benefit
24 of the doubt, okay? Somebody was out of town. They wanted
25 multiple copies. All kinds of stuff that had -- that are not

1 substantive and that are not material. But Shinhan wanted
2 them. That's fine. And then the only thing that changed was
3 the B of A decision came down. And then, all of a sudden,
4 Shinhan was reevaluating the settlement because it decided that
5 it felt that it didn't want to go through with it because,
6 understandably, at the level of human nature, a decision comes
7 down that would have let them off the hook. It's no more
8 complicated than that.

9 So our argument has now been advanced as to why that
10 settlement, that until that moment was a good settlement, is no
11 longer a good settlement. So I will apply the Winston factors
12 and I will tell you what my conclusion is. And you'll all take
13 it from there.

14 MR. BICKS: All right. I appreciate that. Just to
15 be super clear, we don't at this point qualify anything as
16 being a good settlement or a bad settlement. What I've said to
17 Mr. Cox all --

18 THE COURT: But that's disingenuous. The B of A
19 decision, and I literally do not know where in the
20 constellation of those defendants Shinhan falls because it's
21 irrelevant to the narrow issue that's before me. But generally
22 speaking, the B of A ruling was a sweeping ruling against
23 Lehman and in favor of the defendants. Okay, I would add
24 parenthetically that I would cite that as Exhibit A in the
25 category of Lehman doesn't always win when they walk through

1 this door. Okay? That's got nothing to do with it.

2 But -- so good or bad, Shinhan then was faced with if
3 we hadn't settled, we would not have to pay anything and now
4 because we "settled", we have to pay money. Paying money is
5 worse than not paying money if you're the party paying money.
6 It's just simple.

7 MR. BICKS: All right. I was making a slightly
8 different point. At this point, the position that the client
9 takes in the litigation has nothing to do with the clients
10 looking either backwards or forwards and saying this is a good
11 settlement or it's a bad settlement. Our position all along
12 has been it either is a settlement or it is not. It is --

13 THE COURT: And what -- and just hypothetically, even
14 though it's not an issue now, what caused Shinhan to change its
15 mind?

16 MR. BICKS: Maybe it's the same thing that caused Mr.
17 Kasmarsick (ph) to change his mind. The reality is, and
18 Winston recognizes this in the cases that we cited in our
19 brief, if all that happened was somebody woke up one morning
20 before they signed the agreement, the instant before they
21 signed that agreement that says it's not effective until you
22 sign it, then the answer is, actually they can change their
23 mind. They can change their mind, because that's the agreement
24 that the parties negotiated. That's the agreement that Lehman
25 prepared for us.

1 I want to address the moral hazard piece because
2 there -- certainly Mr. Cox is aware, his client is aware that
3 at the exact same time that we are supposedly engaging in this
4 foot dragging to hold off on signing this agreement, we are
5 literally --

6 THE COURT: Let's not characterize it as foot
7 dragging. Let's characterize it factually accurately, which is
8 that there was -- there were weeks and weeks of delay
9 occasioned solely by Shinhan and at Shinhan's request. Do you
10 agree with that?

11 MR. BICKS: I do.

12 THE COURT: Okay.

13 MR. BICKS: And during --

14 THE COURT: So --

15 MR. BICKS: And during those weeks and weeks of
16 delay, occasioned principally, if not solely, by the requests
17 of our client, all of which were honored and in very good humor
18 by the folks at Lehman, who we appreciate. During that same
19 period of time, we were in the process of consummating
20 settlements which were funded -- signed and funded, literally
21 within the same period of time between April 20th and when your
22 decision comes down. We were consummating settlements for
23 other clients. That's -- to me --

24 THE COURT: Who's the we? I don't know what you're
25 talking about.

1 MR. BICKS: K&L Gates on behalf of other defendants
2 in these actions.

3 THE COURT: What does that have to do with anything?

4 MR. BICKS: To me, Your Honor, what it has to do with
5 is if the suggestion is that we were trying to outsmart Lehman
6 on behalf of one client, why wouldn't we have done it for
7 others?

8 THE COURT: I want to make it perfectly clear,
9 because I feel that a record is being created here that someone
10 might want to use on appeal that indicates that I'm finding
11 facts that are somehow in dispute. All of what you just said
12 is completely irrelevant to my decision making process. So you
13 may not be doing this, but I'm feeling strongly that you are
14 trying to engage me in a discussion that will appear as if
15 somehow I decided disputed facts. There are none. There is a
16 simple timeline. It's set forth in the papers. That's the
17 basis for the ruling on a straightforward application of those
18 undisputed facts to and under the Winston factors. Period. So
19 I'm not going to respond to that statement. I have no idea why
20 it's relevant.

21 MR. BICKS: And just to be clear, that is not my
22 intention at all. The very last argument that was advanced in
23 papers by Lehman, the last argument in their last pleading,
24 distilled down to its essence is that we were trying to gain
25 the outcome here. That's their argument. All I'm doing is

1 responding and noting that if we were going to try to game the
2 outcome, why when they called us on the morning that you issued
3 your ruling, there's a fact -- undisputed fact that's in the
4 record, when they called us at 10:30 that morning and said,
5 "Are we done? Are we done?" I don't know what they knew when
6 they called us, because we didn't take any discovery. I don't
7 know what they knew. I know what we knew. We didn't know
8 anything. Maybe they knew exactly what we knew, which was
9 nothing.

10 THE COURT: Again, you -- again, I'm not going to
11 engage on this topic because it's irrelevant, unless somebody
12 makes it relevant. So if what you're telling me now is that
13 you believe -- I don't remember what moment the decision was
14 issued. I don't know who called whom when. Irrelevant.

15 MR. BICKS: Well, the folks at this table seem to
16 think it's quite relevant. They made it the last argument in
17 their reply brief. That was the only reason I make the point.
18 I think I'm just about done, Your Honor. I would ask that you
19 do look, though, in particular at one -- just one -- literally
20 one sentence of the reply brief. There is a sort of a stunning
21 sentence in the reply brief in paragraph 19 which says the
22 release agreement does not set forth the terms and conditions
23 of the settlement. That's in paragraph 19 of the Lehman reply
24 brief.

25 I guess I would challenge Lehman to identify a single

1 term of the settlement that is not in the release agreement.
2 And the answer is, they won't be able to because you can look
3 at the release agreement. That's in the record as well. And I
4 promise you that what you will see when you look at the release
5 agreement, there is not one single term that would relate to
6 what Lehman calls the settlement that is not in that document.
7 And that's a significant -- this is a sort of a significant
8 whiff because, again, what this is is Lehman trying to ask you
9 to take a course down the middle between enforcing what they
10 say was in the agreement made on April 20th, which they know
11 really isn't an agreement because it's missing too many pieces,
12 and asking you to enforce a negotiated agreement that has one
13 fatal flaw, which is that it was never signed.

14 So they realize -- that on the law, they realize
15 they've got an issue over here. They've got an issue over
16 here. They're asking you to take a path down the middle, sort
17 of mash them together. You know, it works for making meatloaf,
18 but it's not great for, you know, legal analysis.

19 THE COURT: It's super simple. If the settlement
20 agreement is upheld, there's going to be a payment of money and
21 there are going to be releases. That's it.

22 MR. BICKS: And when are we to pay? I don't mean to
23 ask you that question, but I'll restate it. If you believe
24 that there was an agreement on April 20th, it is -- it's
25 inconceivable that that term -- that term was never discussed.

1 There's absolutely nothing in the record. They know it was
2 never discussed. There's nothing in Judge Mabey's (ph)
3 correspondences to suggest that it was discussed. What more
4 material term could there be than that.

5 And I point you to our brief. I won't cite the
6 cases, obviously, but in our brief at pages -- on page 36,
7 paragraphs 10 and 11, we go through the --

8 THE COURT: So the whole thing was illusory? This is
9 a complete waste of everyone's time. A waste of Judge Mabey's
10 time. And when Judge Mabey, after all that he did, said the
11 parties have agreed to a settlement, that that's not
12 meaningful?

13 MR. BICKS: No, it's the risk that when they drafted
14 an agreement and sent it to us that says this is binding as
15 soon as we sign it, that if we never signed it, it never became
16 binding.

17 THE COURT: Okay, thank you.

18 MR. BICKS: Thank you.

19 THE COURT: Any response, Mr. Cox?

20 MR. COX: No, Your Honor, unless you want me to
21 address any particular --

22 THE COURT: Do you want to address the point about so
23 you sign it and when -- do they actually pay the money?

24 MR. COX: Yes, Your Honor. First of all, Your Honor
25 can certainly issue an order that orders them to pay the money

1 whenever is appropriate.

2 THE COURT: But counsel's point is that because the
3 agreement, or Judge Mabey's e-mail, or anything else for that
4 matter did not specify the date on which the payment would be
5 made, that that's somehow fatal to the vitality or the
6 enforceability of the settlement.

7 MR. COX: I don't think so, Your Honor. It's --
8 first of all, it's the nuts and bolts of the timing of the
9 releases. It's not the actual settlement. And if you look at
10 paragraph 39 of our opening brief and at paragraph 9, I think
11 we repeat a lot of the same cases in our reply brief, where the
12 Court is enforcing an oral agreement to settlement. Because as
13 Your Honor pointed out very clearly, the settlement where -- we
14 have an ADR order where the parties are supposed to have
15 authority to bind the clients. And once you see the settlement
16 -- we hereby accept the settlement, you have a settlement.
17 Whether you need to implement it with some language or
18 something is irrelevant to the fact that we had a binding
19 settlement at the time.

20 And also, I pointed it out in our brief, but also too
21 the effectiveness of the release, you know, that Section 5,
22 what it says is the releases are effective upon signature and
23 payment, which is how releases work, right? You don't release
24 somebody until the payment is made. But here, if you notice in
25 the briefing, payment gets taken out in the first reference in

1 Shinhan's opposition and then it's never part of the bolded
2 section of that. And I think they're trying to run away from
3 that. And the fact of the matter is, is the release agreement
4 reads like a release agreement, which is okay, the release is
5 going to be effective a certain number of days after payment.
6 That is ministerial, right, because all it is is implementing
7 the settlement reached by Judge Mabey on April 20th.

8 And one thing I'd also point out is this merger
9 agreement argument is -- the agreement -- the release agreement
10 wasn't signed. So Shinhan wants to take advantage of the terms
11 of the agreement as if it's been signed, but it wasn't. So we
12 had the settlement. And so you can't have it both ways.

13 THE COURT: Right. And there's always an implied
14 covenant of good faith and fair dealing, right?

15 MR. COX: Absolutely.

16 THE COURT: Okay. Thank you.

17 MR. COX: Thank you, Your Honor.

18 THE COURT: All right. Thank you very much. I'm
19 going to give you -- the way this will work is I'm going to
20 read something. It will probably take me about 10 or 15
21 minutes to read it. You can get a transcript when it's ready.
22 I'll ask you to prepare an order and you can in the order refer
23 to the transcript and/or attach it and that will provide you a
24 basis for any subsequent action that you wish to take. All
25 right.

1 Before the Court is Lehman Brothers Special Finance
2 Inc.'s, LBSF's motion pursuant to the amended SPV ADR order and
3 section 105(a) of the Bankruptcy Code to: 1) enforce settlement
4 and release agreement; and 2) grant attorney's fees and
5 mediator's fees and costs. The motion. Shinhan opposes the
6 motion.

7 Background. The facts relevant to the narrow issue
8 before the Court as undisputed, as evidenced by the joint
9 stipulation of facts signed by the parties on January 27th,
10 2017, and subsequently entered by the Court. On September
11 14th, 2010, LBSF initiated an adversary proceeding captioned
12 LBSF v. Bank of American National Association, et al., case
13 number 10-03547 against some 250 defendant noteholders, note
14 issuers, and indentured trustees seeking inter alia to recover
15 approximately \$1 billion that was distributed to the defendant
16 noteholders following the commencement of the Lehman Brothers'
17 Chapter 11 proceedings in September 2008.

18 The action is colloquially known as the distributed
19 action. Shinhan is one of the defendants named in the
20 distributed action. Shinhan denied that it had any liability
21 to Lehman in the distributed action. In April 2016, while
22 fully briefed dispositive motions in the distributed action
23 were sub judice in this Court, LBS and Shinhan engaged in
24 mediation discussions pursuant to the amended SBV ADR order.
25 The Honorable Ralph Mabey served as mediator.

1 At the conclusion of the mediation, Judge Mabey
2 proposed that the parties settle the matter by paying LBSF a
3 certain amount, the settlement amount. On or about April 20th,
4 2016, both LBSF and Shinhan accepted Judge Mabey's proposal as
5 to the settlement amount and Judge Mabey asked LBSF to provide
6 settlement documentation to Shinhan.

7 The next day, LBSF sent a draft release agreement,
8 the release agreement, to Shinhan's counsel for review and
9 comment. Shinhan proposed certain changes to the release
10 agreement, which LBSF subsequently accepted. Specifically, on
11 May 11th, 2016, Shinhan revised Section 4 of the release
12 agreement to require that the parties execute hard copies as
13 opposed to electronic copies and in accordance with that
14 change, revised the date of the release agreement to be dated
15 as of the date Shinhan executed its respective hard copies.

16 Shinhan's counsel later requested that LBSF: 1. Send
17 Shinhan two original signed copies of the release agreement;
18 and 2. Provide documents establishing Lehman's signatory
19 authority to sign the release agreement.

20 On May 27th, 2016, LBSF advised Shinhan's counsel
21 that LBSF had sent the requested materials to Shinhan. On June
22 17th, 2016, Shinhan's counsel notified LBSF that Shinhan was
23 unable to complete its internal approval process because
24 certain staff members were out of the office and that signature
25 and payment would most likely occur the week of June 27th,

1 2016.

2 On the morning of June 28th, 2016, Shinhan's counsel
3 confirmed by e-mail that Shinhan had completed its internal
4 approval process and that the release agreement would be signed
5 by June 30th, 2016. Several hours after such e-mail was sent,
6 this Court issued its decision in the distributed action,
7 dismissing LBSF's claims against, among others, Shinhan. Two
8 days after the Bank of America decision was rendered, Shinhan's
9 counsel advised LBSF that it had not signed the release
10 agreement and was still "evaluating" the Bank of America
11 decision.

12 LBSF replied that it did not believe that the Bank of
13 America decision affected the parties' settlement agreement and
14 that Shinhan should transfer the settlement amount to LBSF.
15 The parties returned to Judge Mabey to attempt to resolve the
16 dispute, but were unable to reach a consensual resolution. As
17 a result, the parties have now sought the Court's intervention
18 in this matter.

19 As described in the motion, LBSF asserts that the
20 parties had a binding and enforceable settlement agreement as
21 of April 20th, 2016, when the parties accepted Judge Mabey's
22 settlement proposal. LBSF urges the Court to treat the April
23 20th settlement as final, binding, and enforceable, despite the
24 fact that Shinhan never signed the release agreement.

25 Shinhan, on the other hand, contends that the parties

1 did not enter into an enforceable settlement on April 20th,
2 2016, and that certain provisions in the release agreement
3 preclude a finding that the release agreement is an enforceable
4 agreement in the absence of Shinhan's signature. For the
5 reasons that follow, the Court finds in favor of LBSF.

6 II. Discussion. A. Applicable law.

7 The Second Circuit has held that in deciding whether
8 an unexecuted settlement agreement -- unexecuted agreement is
9 binding and enforceable, Courts must examine four factors: 1.
10 Whether there has been an express reservation of the right not
11 to be bound in the absence of a writing; 2. Whether there has
12 been partial performance of the contract; 3. Whether all of the
13 terms of the alleged contract have been agreed upon; and 4.
14 Whether the agreement at issue is the type of contract that is
15 usually committed to writing. *Winston v. Mediafire*
16 *Entertainment Corporation*, 777 F.2d 78 at 80 (Second Circuit,
17 1985).

18 No single factor is dispositive and the circumstances
19 may be shown by oral testimony, correspondence, or other
20 preliminary or partially complete writings. *Id* at 81.

21 Under the first *Winston* factor, the Court must
22 consider whether there was an express of the right not to be
23 bound in the absence of a writing. When the parties accepted
24 Judge Mabey's settlement proposal on April 20th, 2016, neither
25 party reserved the right to be bound by such settlement, only

1 upon signature of an agreement. Moreover, nothing in the
2 correspondence between the parties suggests that Shinhan
3 reserved the right to be bound to the April 20th, 2016
4 settlement only upon signature of an agreement.

5 Following the parties acceptance of Judge Mabey's
6 settlement proposal, counsel for Shinhan repeatedly stated that
7 the parties reached an agreement on the terms of the release
8 agreement and that it would remit payment once its internal
9 approval process was complete. For example, after LBSF sent
10 Shinhan two executed copies of the release agreement, Shinhan's
11 counsel responded that, "Shinhan is trying to get everything
12 signed up and payment remitted by the end of this week." Two
13 weeks later, Shinhan's counsel wrote to LBSF that, "Shinhan
14 just confirmed that they have completed their internal approval
15 process and the settlement agreement will be signed by
16 Thursday, June 30th." At no point before the Bank of America
17 decision was issued did Shinhan express an intent not to sign
18 the release agreement. In fact, the aforementioned
19 correspondence with LBSF reveals precisely the opposite.

20 Although Shinhan points to Sections 4 and 5 of the
21 release agreement, both of which state that the release
22 agreement will become effective upon execution by both parties,
23 Shinhan's reliance on such language is misplaced. This
24 language simply means that LBSF's release automatically becomes
25 effective upon execution and payment, not that the April 20th,

1 2016 settlement itself will become effective upon signing the
2 release agreement and paying the settlement amount.

3 Moreover, although Shinhan contends that certain
4 provisions in the release agreement manifests an implied intent
5 not to be bound, the correspondence between April 20th, 2016
6 and the day the Bank of America decision was issued undercuts
7 that argument because during this time, Shinhan repeatedly
8 assured LBSF that it intended to sign the release agreement.

9 As LBSF correctly points out, the real issue in this
10 dispute is not the enforceability of the April 20th, 2016
11 settlement, but instead whether Shinhan can renege from the
12 April 20th settlement, purportedly because it did not sign a
13 document entitled "release agreement."

14 Only after this Court issued the Bank of America
15 decision did Shinhan, for the first time, communicate that it
16 was still evaluating its agreement with LBSF. The intent
17 manifest here is not the intent not to be bound absent a signed
18 writing. Rather it is a change of heart and strategy following
19 this Court's Bank of America decision.

20 The first Winston factor weighs in favor of enforcing
21 the April 20th settlement and the release agreement. Under the
22 second Winston factor, the Court must consider whether there
23 has been partial performance of the contract. There is no
24 dispute that LBSF has not released Shinhan or dismissed Shinhan
25 from the adversary proceeding. There was also no dispute that

1 Shinhan has not remitted the settlement amount or released
2 LBSF. These are basic elements of consideration that would
3 have been due under the release agreement. It is undisputed
4 that they have not been exchanged.

5 Although LBSF states that its execution of the
6 release agreement constitutes partial performance, the Second
7 Circuit rejected such an argument in Winston, finding that
8 there was no partial performance despite one side signing of
9 the alleged agreements at issue. Because neither LBSF nor
10 Shinhan has partially performed under the release agreement,
11 the second Winston factor weighs against enforcing the April
12 20th settlement and the release agreement.

13 Under the third Winston factor, the Court must
14 consider whether all of the terms of the alleged contract have
15 been agreed upon. Judge Mabey confirmed in an e-mail on April
16 20th, 2016 that the parties agreed to settle the dispute
17 through the payment of the settlement amount to LBSF "in full
18 and complete settlement." At no point on or after April 20th
19 did either party suggest that Judge Mabey mischaracterized or
20 omitted material terms of the settlement that was reached on
21 April 20th.

22 Moreover, based on the correspondence between the
23 parties, it is evident that the parties agreed to the material
24 terms of the release agreement and that there was nothing left
25 to negotiate. In fact, neither party disputes that by the time

1 the Bank of America decision was issued, all material terms in
2 the release agreement were agreed upon and the only remaining
3 item was to obtain Shinhan's signature. As such, the third
4 Winston factor weighs in favor of enforcing the April 20th
5 settlement and the release agreement.

6 Under the fourth Winston factor, the Court must
7 consider whether the agreement at issue is the type of contract
8 that is usually committed to writing. While settlement
9 agreements are generally reduced to writing, in this case there
10 was, indeed, a complete, written release agreement. Its only
11 missing element was Shinhan's signature. This weighs in favor
12 of enforcing the April 20th settlement agreement, even absent
13 Shinhan's signature on the release agreement.

14 By the time the Bank of America decision was issued,
15 Shinhan had successfully completed its internal approval
16 process and indicated that it intended to sign the release
17 agreement on June 30th. Most notably, it was upon issuance of
18 this Court's Bank of America decision directing dismissal of
19 LBSF's claims against Shinhan that Shinhan communicated it was
20 still evaluating its position. This undercuts not only the
21 purpose of engaging in mediation, but also undermines the point
22 of reducing a settlement to writing.

23 Strategic delay ought not to be able to be used to
24 enhance one's position or to renege on an otherwise binding
25 oral agreement. The Court finds that analysis of the fourth

1 Winston factor weighs in favor of enforcing the April 20th
2 settlement and the release agreement. On balance, therefore,
3 the Court finds that the first, third, and fourth Winston
4 factors weigh in favor of enforcing the April 20th settlement
5 and the release agreement.

6 Finally, the amended SPV ADR order provides for
7 sanctions if a party has not complied with such order in good
8 faith. Despite LBSF's request for sanctions in the form of
9 attorney's fees and mediator fees, the Court finds that
10 sanctions are not warranted in this case. It is clear that
11 LBSF and Shinhan have dramatically divergent views regarding
12 the enforceability of the settlement agreement between the
13 parties. This circumstance, without more, does not justify
14 imposing sanction on Shinhan for failing to remit the
15 settlement amount. The undisputed evidence reflects that
16 Shinhan -- that LBSF and Shinhan participated in the mediation
17 process in accordance with the amended SPV ADR order.
18 Shinhan's post Bank of America decision reevaluation of the
19 release agreement does not, in this Court's view, rise to the
20 level of sanctionable conduct. The Court therefore denies
21 LBSF's request for sanction.

22 Accordingly, based on the pleadings submitted by the
23 parties and upon the full record of today's hearing, the Court
24 grants the motion -- the Court finds that the Winston factors
25 on balance weigh in favor of finding that an enforceable

1 settlement exists between the parties, notwithstanding the fact
2 that Shinhan did not sign the release agreement. The parties
3 are directed to submit an order in accordance with this ruling.

4 All right?

5 (Chorus of thank you)

6 THE COURT: All right, so if I could please ask you
7 to share a draft agreement among the parties and then send it
8 to chambers with an indication that everybody signs off on the
9 language, if not the substance, all right?

10 (Chorus of thank you)

11 MS. MARCUS: May I discuss the last issue?

12 THE COURT: Yes, Ms. Marcus.

13 MS. MARCUS: It's really a procedural matter, Your
14 Honor --

15 THE COURT: Okay.

16 MS. MARCUS: -- that relates actually to the ADR
17 order for --

18 THE COURT: Okay.

19 MS. MARCUS: -- affirmative claims on a derivatives
20 contracts. As Your Honor I'm sure will recall, every month
21 since September of 2009 when Judge Peck issued that order, a
22 partner of Weil has been reporting to the Court on the number
23 of settlements, the number of pending ADRs going forward.
24 We're now at a point where the volume of remaining open ADR
25 receivables is so small that we'd like to spare the estate the

1 expense of doing that monthly reporting. And what we suggest
2 is that we'll do it semi-annually, so perhaps in June and
3 December of each year. I don't know if we need to submit a
4 revised order or how you'd like to handle that.

5 THE COURT: I'll leave that to you. I don't know if
6 folks out in the world look forward to that report every month
7 and might have a question if it doesn't appear, you could
8 simply submit an order on notice of presentment that indicates
9 the change.

10 MS. MARCUS: Okay. Thank you, Your Honor. We'll do
11 that.

12 THE COURT: That sounds fine.

13 MS. MARCUS: And the first -- I guess we were due to
14 file a report today, we're not going to do that if that's okay
15 with Your Honor.

16 THE COURT: That's fine. It's a good thing that the
17 numbers are getting smaller.

18 MS. MARCUS: Yes, I agree.

19 THE COURT: All right?

20 MS. MARCUS: Thank you, Your Honor.

21 THE COURT: Thank you. Okay. Thank you.

22 (Chorus of thank you)

23 (Whereupon, these proceedings were concluded at 10:43

24 a.m.)

25

I N D E X

RULINGS

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settlement and release agreement	
Motion pursuant to the Amended SPV ADR Order and	31
Section 105(a) of the Bankruptcy Code to grant	
attorneys and mediators fees and costs	

1 C E R T I F I C A T I O N

2

3 I, Jamie Gallagher, certify that the foregoing
4 transcript is a true and accurate record of the proceedings.

5

6

7

8 _____
Jamie Gallagher

9

10

11 DATE: March 22, 2017

12

13

14 Veritext Legal Solutions

15 330 Old Country Road

16 Suite 300

17 Mineola, NY 11501

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[& - alleged]

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